



June 9, 2023

**VIA ELECTRONIC SUBMISSION**

National Freedom of Information Officer  
<https://foiaonline.gov/foiaonline/action/public/request>

**RE: Communications between Environmental Protection Agency Region 9 and Bureau of Land Management, Bakersfield Field Office, regarding Clean Air Act Conformity Review for Applications for Permits to Drill Oil and Gas Wells**

Dear National EPA FOIA Officer:

This is a request for information on behalf of Center for Biological Diversity (“the Center”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. We respectfully urge the U.S. Environmental Protection Agency (“EPA”) to respond in the 20-day timeframe provided under 5 U.S.C. § 552(a)(6)(A)(i) and 40 C.F.R. § 2.104(k).

Because the Center is a non-profit public interest organization, it requests that all copy and research fees be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). A fee waiver is justified because the requested information is likely to contribute significantly to public understanding of federal agencies’ operations and activities, and the information is not primarily in the Center’s commercial interest. Accordingly, the Center fully expects that such a waiver will be granted.

**I. Records Requested**

The Center requests all correspondence between EPA Region 9 and the Bureau of Land Management (“BLM”) Bakersfield Field Office regarding requests by Region 9 for BLM’s air emissions calculations and Clean Air Act conformity review for the following applications for permits to drill:

- DOI-BLM-CA-C060-2023-0049-EA; 6 APDs to Aera in Lost Hills
- DOI-BLM-CA-C060-2023-0050-EA; 5 APDs to Aera in Lost Hills
- DOI-BLM-CA-C060-2023-0033-EA; 6 APDs to Berry Petroleum in Midway Sunset
- DOI-BLM-CA-C060-2023-0034-EA; 2 APDs to CREH in Buena Vista Hills
- DOI-BLM-CA-C060-2023-0020-EA; 4 APDs to Chevron in Lost Hills
- DOI-BLM-CA-C060-2023-0018-EA; 27 APDs to Holmes Western in Midway Sunset
- DOI-BLM-CA-C060-2023-0013-EA; 19 APDs to Berry Petroleum in Main Camp
- DOI-BLM-CA-C060-2023-0012-DNA; 2 APDs to Berry Petroleum in Midway Sunset
- DOI-BLM-CA-C060-2023-0014-EA; 2 APDs to E&B Natural Resources in Poso Creek
- DOI-BLM-CA-C060-2022-0112-EA; 6 APDs to CRPC in Mount Poso

- DOI-BLM-CA-C060-2022-0071-EA; 1 APD for Innex California in Kettleman Middle Dome

For purposes of this request, the term “correspondence” includes but is not limited to, all letters, emails, text messages, instant messages, telephone voicemails, phone logs, and internet “chat” or social media messages, to the full extent that any such messages fall within the definition of “agency records” subject to FOIA, 5 U.S.C. § 552.

The request includes, but is not limited to, correspondence between the BLM Bakersfield Field Office and the following EPA Region 9 staff:

- Janice Chan, [Chan.Janice@epa.gov](mailto:Chan.Janice@epa.gov) (Acting Manager, Environmental Review Branch, Region 9)
- Tom Kelly, [Kelly.ThomasP@epa.gov](mailto:Kelly.ThomasP@epa.gov) (Air & Radiation Division, Region 9)
- Tom Plenys, [Plenys.Thomas@epa.gov](mailto:Plenys.Thomas@epa.gov) (Environmental Review Branch, Region 9)
- Jean Prijatel, [Prijatel.Jean@epa.gov](mailto:Prijatel.Jean@epa.gov) (former Manager, Environmental Review Branch, Region 9)

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i) and 40 C.F.R. § § 2.104(k), and that response must “at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions[, if any, you] will claim with respect to any withheld documents.” *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information in a “rolling release” as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. We additionally request that the most recent documents be produced first, particularly documents from December 2022 to the present, should EPA determine that it is necessary to release responsive documents in stages. The Center requests electronic copies of the records whenever possible.

## **II. Claims of Exemption from Disclosure**

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency’s justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure.

## **III. Fee Waiver**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), the Center requests that EPA waive all fees associated with responding to this request because the Center seeks this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Center requests that it reduce them to the extent possible.

FOIA provides that fees shall be reduced “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>1</sup> EPA’s FOIA regulations contain an identical requirement.<sup>2</sup> The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals reference and apply these factors.<sup>3</sup> These factors are:

- A. Disclosure of the Information ‘is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.’
  - (1) **The subject of the request:** Whether the subject of the requested records concerns ‘the operations or activities of the government’;
  - (2) **The informative value of the information to be disclosed:** Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities;
  - (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to ‘public understanding’; and
  - (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.
- B. Disclosure of the Information ‘is Not Primarily in the Commercial Interest of the Requester.’
  - (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
  - (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>2</sup> 40 C.F.R. § 2.107(l).

<sup>3</sup> See, e.g., Stephen J. Markman, U.S. Dep’t of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at [http://www.justice.gov/oip/foia\\_updates/Vol\\_VIII\\_1/viii1page2.htm](http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm); *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that “[f]or a request to be in the ‘public interest,’ four criteria must be satisfied,” and citing agency’s multi-factor fee waiver regulation).

<sup>4</sup> Markman, *supra* note 3.

The Center's request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

**A. Public Interest Factor**

The disclosure of this information is in the “public interest because it is likely to contribute significantly to public understanding of government operations or activities.”<sup>5</sup> The Center's request complies with each of the criteria DOJ has identified for the public interest factor.

**i. The request concerns the operations or activities of the government.**

The Center seeks information related to EPA Region 9's communication with BLM regarding BLM's determination that drilling will have only *de minimis* emissions and is therefore exempt from conformity review under the Clean Air Act. Since both EPA and BLM are arms of the federal government, such records plainly concern “operations or activities of the government.”<sup>6</sup>

**ii. The disclosure is “likely to contribute” to an understanding of government operations and activities.**

The Clean Air Act authorizes the EPA to establish National Ambient Air Quality Standards (“NAAQS”) for pollutants deemed by EPA to be “criteria” pollutants. 42 U.S.C. §§ 7407–7410. States are required to submit a State Implementation Plan (“SIP”) to EPA that regulates the states' fulfillment of the Clean Air Act and the enforcement of the NAAQS. *Id.* § 7410(a)(2). EPA designates areas that fail to attain a NAAQS standard as “nonattainment areas.” *Id.* §§ 7407(d)(1).

Section 176(c)(1) of the Clean Air Act provides that no federal agency shall “engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP].” 42 U.S.C. § 7506(c)(1). Federal activities must not:

- (i) cause or contribute to any new violation of any standard in any area;
- (ii) increase the frequency or severity of any existing violation of any standard in any area; or
- (iii) delay timely attainment of any standard of any required interim emission reductions or other milestones in any area.

42 U.S.C. § 7506(c)(1).

A conformity determination is required for each criteria pollutant or precursor in a nonattainment or maintenance area caused by a federal action that would equal or exceed the rates provided in the regulations. 40 C.F.R. § 93.153(b).

Federal law prescribes a two-step process. First, an agency must determine whether its action will result in emissions exceeding a certain threshold (or *de minimis* level). 40 C.F.R. §

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<sup>5</sup> See 40 C.F.R. § 2.107(l)(1).

<sup>6</sup> See 40 C.F.R. § 2.107(l)(2)(i).

93.153(b). Second, if the threshold requirement is met, the agency must prepare a full “conformity analysis” and mitigate the Project’s emissions so that the Project does not impair a region’s ability to implement its plan for improving air quality.

The basis underlying BLM’s approval of oil and gas drilling permits and determination that drilling will have only de minimis emissions in California is not currently public knowledge. As the regional agency responsible for regulating air pollution in California, EPA Region 9’s communications with BLM regarding its underlying data and emissions calculations for the above-referenced permits will clarify BLM’s Clean Air Act conformity review process. Thus, disclosure is “likely to contribute” to public understanding of government operations and activities.<sup>7</sup>

**iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.**

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject. The general public is already following issues related to oil and gas drilling in California and air pollution in the San Joaquin Valley, which has frequently been the focus of investigative reports by members of the media.<sup>8</sup> Thus, the non-public records concerning this topic that the Center is requesting will attract interest from a broad audience of Americans.

The Center is particularly able to ensure that the information requested will be disseminated to the general public. The Center is a non-profit public interest organization that works through science, law, and policy to advocate for increased protections for California species and their habitats, a livable climate, and healthy communities by engaging at every step of federal fossil fuel planning, leasing, and development.<sup>9</sup> The Center has made protecting the nation’s public lands one of its top priorities. In light of its substantial scientific and legal expertise, the Center is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Air Act. In addition, the Center has the “ability and intention” to convey this information to the public.<sup>10</sup> The Center can publicize information received from this request in its regular electronic newsletters and online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request. The Center’s communications staff can disseminate newsworthy information obtained from this request to the media.

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<sup>7</sup> See 40 C.F.R. § 2.107(l)(2)(ii).

<sup>8</sup> See, e.g., E. McCormick, *The Guardian*, *Revealed: the 10 worst places to live in US for air pollution*, Mar. 3, 2023, available at: <https://www.theguardian.com/us-news/2023/mar/08/10-most-air-polluted-places-to-live-us>; Miranda Green, *Washington Post*, *A California county, despite the state’s climate goals, further embraces fossil fuels*, April 10, 2021, available at [https://www.washingtonpost.com/climate-environment/a-california-county-despite-the-states-climate-goals-further-embraces-fossil-fuels/2021/04/09/43b28254-9655-11eb-962b-78c1d8228819\\_story.html](https://www.washingtonpost.com/climate-environment/a-california-county-despite-the-states-climate-goals-further-embraces-fossil-fuels/2021/04/09/43b28254-9655-11eb-962b-78c1d8228819_story.html); Judith Lewis Mernit, *High Country News*, *The Health Hazards of California’s Neighborhood Drilling*, April 13, 2021, available at <https://www.hcn.org/articles/climate-desk-oil-the-health-hazards-of-californias-neighborhood-drilling>; Cade Cannedy, *Peninsula Press*, *Oil Drilling on California’s Federal Lands Set to Resume After 8 Years, Sets up Early Test of Biden Administration*, available at <http://peninsulapress.com/2020/12/09/oil-drilling-on-californias-federal-lands-set-to-resume-after-8-years-sets-up-early-test-of-biden-administration>.

<sup>9</sup> See <https://www.biologicaldiversity.org/about/>.

<sup>10</sup> See, e.g., Markman, *supra* note 3.

**iv. The information will contribute “significantly” to public understanding of government operations or activities.**

The information the Center seeks will contribute “significantly” to the ongoing public conversation about pollution from oil and gas wells and the management of federal land for oil production.<sup>11</sup> None of the materials the Center has requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of permitting of new oil and gas wells in California and the resulting air pollution. As discussed above, the Center will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy, including in any future public proceedings concerning oil and gas permitting and development. Releasing this information will, thus, significantly enhance public understanding of any federal approval of oil and gas development in California.

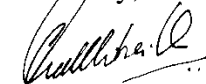
**B. Commercial Interest Factor**

The Center is a non-profit organization with no commercial, trade, or profit interests in the requested information. The Center seeks to use this information solely to inform the public and to support advocacy efforts around protecting human health and the environment. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest. *See* 40 C.F.R. § 2.107(l).

For the foregoing reasons, a fee waiver is warranted under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). If EPA does not believe that the above information is sufficient to justify a waiver, please contact us for further documentation before deciding upon the waiver request.

Thank you for your assistance in processing this request. Please contact me at the email or phone number below if you have any questions or concerns about this request for information.

Sincerely,



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<sup>11</sup> *See* 40 C.F.R. § 2.107(l)(2)(iv).